No. 12,986

ed States Court of Appeals
For the Ninth Circuit

NG FOO,
Appellant,

RD MCGRATH, Attorney Gen-
the United States,
Appellee.

APPELLANT'S OPENING BRIEF.

CHOW AND SING,
550 Montgomery Street, San Francisco 11, California,
Attorneys for Appellant.

Subject Index

Cases

Constitutions

Statutes

Texts

No. 12,986

ited States Court of Appeals
For the Ninth Circuit

ING FOO,
Appellant,
s.

ARD MCGRATH, Attorney Gen-
f the United States,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

ction in this case was brought in the Court nder Section 503 of the Nationality Act of Stat. 1171; 8 U.S.C.A. 903) for the purpose ishing the citizenship of the appellant. The t, Wong Wing Foo, claims to be a citizen onal of the United States. He claims to have n in China on June 22, 1928. He arrived in ed States at the Port of San Francisco, Cali- n November 22, 1948, and applied before the ion authorities for admission as an Ameri-

that the appellant failed to satisfactorily e
that he is the blood son of Wong Yem and
is not entitled to be admitted to the United S
a citizen thereof. It is conceded by the imm
authorities, however, that appellant's alleged
Wong Yem, is a citizen of the United Stat
decision of said board was appealed to the
sioner of Immigration and Naturalization a
to the Board of Immigration Appeals. The
of the Board of Special Inquiry was affirmed
appellant was ordered excluded from the
States. Thereafter, appellant instituted the
the Court below seeking a judicial declaratio
citizenship. The case came to trial without
The appellant and his alleged father, Wor
were presented as witnesses by the prosecu
establish the father and son relationship. The
offered no evidence or witness other than th
gration records pertaining to the applicatio
appellant for admission before the immigrati
ice. The Court found for the defendant. It
this judgment that the appellant, seeking ev
a declaration of his United States citizens
nationality, prosecutes this appeal.

JURISDICTIONAL STATEMENT.

The Court below had jurisdiction by the r

Nationality Act of 1940 (54 Stat. 1171, A. 903).

Court has appellate jurisdiction pursuant to Law 72, 81st Congress, approved May 24, U.S.C.A. 1291 and 1292).

STATUTES INVOLVED.

lment XIV to the Constitution of the United Section 1, reads:

persons born or naturalized in the United es, and subject to the jurisdiction thereof, citizens of the United States and of the es wherein they reside."

n 1993 of the Revised Statutes of the United Acts of April 14, 1802 and February 10, 1855 amended by Act of May 24, 1934, Section 1), A. 6) reads:

children heretofore born or hereafter born of the limits and jurisdiction of the United es, whose fathers were or may be at the time heir birth citizens thereof, are declared to be ens of the United States; but the rights of enship shall not descend to children whose ers never resided in the United States."

n 503 of the Nationality Act of 1940 (8 U.S.) provides, in so far as pertinent here:

any person who claims a right or privilege

or executive official thereof, upon the grou
he is not a national of the United Stat
person, regardless of whether he is wit
United States or abroad, may institute a
against the head of such Department or
in the District Court of the United Sta
the District of Columbia or in the distri
of the United States for the district i
such person claims a permanent residen
judgment declaring him to be a Nationa
United States. * * *"

STATEMENT OF POINTS.

Appellant sets forth the following positio
he intends to rely on appeal:

1. The Court below erred in holding tha
lant has failed to sustain the burden of esta
his relationship to his father, Wong Yem, b
ponderance of evidence.

2. The Court below erred in admitting a
sidering the records and transcripts of the i
tion proceedings other than the transcripts
mony of the plaintiff and his father, Wong Y
admission of which was stipulated by cou
plaintiff.

ARGUMENT.

At the outset we wish to stress the fact

a review of the proceedings had before the States Immigration Service.

Yah Ying Og v. McGrath, 187 F. (2d) 199;
an Seow Tong v. Clark, 83 F. Supp. 482;
hin Wing Dong v. Clark, 76 Fed. Supp. 648;
U. S. v. Clark, 82 Fed. Supp. 412;
hu Leong v. Shaughnessy, 88 Fed. Supp. 91.

evidence and testimony must be produced
nd the conduct of the trial is similar to that
w trial and as if no former proceedings or
s had.

hearing de novo literally means a new hear-
or a hearing the second time. (18 C.J. 486.)
*h a hearing contemplates an entire trial of
controversial matter in the same manner in
ch the same was originally heard. It is in no
e a review of the hearing previously held,
is a complete trial of the controversy, the
e as if no previous hearing had ever been
.''* (Italics ours.)
ollier & Wallis, Ltd. v. Astor, 9 Cal. (2d)
202, page 205.

n the *Application of Murra,* 166 F. (2d)
etition of naturalization was heard in open
here the witnesses were examined before the
udge Major said:
** * the hearing before the court is not for
purpose of reviewing the recommendations
he Examiner;* it is a hearing de novo and

ther the testimony heard by the Examii findings, nor his recommendation are consequence." (Italics ours.)

All this is in direct opposition to the posi the judge who, during the instant trial, ruled

"In a trial de novo, if I am not very n error, *the Court reviewed the testimony t a previous hearing;* and it also takes into eration the testimony produced at this h and then arrives at its own conclusion ba its own opinion and conclusions and th mony adduced on the trial. That is the l less you show me something to the con (Italics ours.)

Transcript of Record, page 53.

Appellant contends that he is a citizen national of the United States on the ground has established a prima facie presumption tha the son of Wong Yem, an American citizen, t a preponderance of evidence. The lower Co its opinion, said appellant has the burden to e his patrimony by a preponderance of evide that he has failed to do so. Inferentially, the lant has made out a prima facie case. It is recognized fact that no official records of vita tics are kept in China, which accounts for th introduction of evidence of birth of the appell the trial, the appellant and his alleged father Yem, testified that they are father and son and

Wong Yem is a cook working in Lodi, Cali-
and living at his place of work, and the ap-
is staying in Stockton, California, about 10
part, attending school. They visit and see each
very weekend and the appellant is supported
father. It is because of his father's occupation
fact that there is no adult education program
eign speaking people in Lodi that the appel-
ved to Stockton and is not presently staying
father in Lodi.

cumulative effect of the repeated assertions
d over again by the father that he has a
son, Wong Wing Foo, should create in the
any reasonable man a belief that such a son
Thus we believe the burden of proof imposed
e plaintiff to establish that he is the lawful
on of Wong Yem has been met and that he
e his prima facie case.

ntrast to the affirmative and positive showing
y the appellant, appellee presented no wit-
and contented himself with the introduction
records and transcript of the immigration
ngs. In the lower Court's opinion, it accepted
ements made before the Immigration Board
ial Inquiry and contained in the records in-
d by the defendant as exhibits to be the collat-
ts in contravention of appellant's claim of
ship of Wong Yem. In this connection the

and Wong Yem testified to the purported
son relationship and defendant introdu
evidence in contravention thereof than t
mony taken before the Immigration Bo
stated in Siu Say v. Nagle, 295 F. 6
cases of this character experience has
strated that the testimony of the partie
terest as to the mere fact of relationshi
be safely accepted or relied upon. R
therefore had to collateral facts for co
tion or the reverse.' The collateral facts
instance are to be found in the transcrip
duced by the defendant."

Transcript of Record, pages 24 and 25

However, the instant case is different from
v. Nagle, supra, which was a habeas corpus
ing whereas the present matter is not a re
administrative action, but is a trial *de novo.*
statements of Wong Yem and the appella
consistent with those contained in the imm
records as given by them and members
family throughout the years. On the questio
effect of the repeated claims and statemen
on various occasions to the Immigration Se
the case of *Johnson v. Ng Ling Fong,* 17 F
11, the Court said:

"The records of the Immigration Dep
concerning the alleged father and his
since 1909 are so complete and the sta
as to the number of births of his childr

n any reasonable doubt as to the relationship
he applicant and his alleged father."

n the case of *Louie Po Hok v. Nagle,* 48 Fed.
3, this Court commented:

similar case arose in Ng Yuk Ming v. Til-
hast, 28 Fed. (2d) 547. There, '13 years be-
e * * * the alleged father testified before the
migration authorities that he has a son bear-
the name of the applicant, * * * which he
firmed on every occasion upon which he was
ed to testify.' The decision of the Court was
the decision of the immigration officials was
supported by the evidence."

lso:

ung Yow v. Nagle, 34 Fed. (2d) 848 (C.C.A.
9th).

elieve this case may be resolved upon two
First, has the plaintiff-appellant made out
facie case; and second, if the answer is in
native, has the defendant-appellee done any-
answer and rebut it?

henever litigation exists somebody must go
with it; the plaintiff is the first to begin; if
does nothing, he fails. If he makes a prima
e case and nothing is done to answer it, the
endant fails."

ones on Evidence, 2d Edition, Sec. 176.

estimony of the appellant and that of his

agreement to matters and facts pertaining to t
ily, its activities, the native village and house,
the association of themselves. They identifi
other correctly. This testimony and showing s
alone should be sufficient to establish the issu
lationship and, if uncontradicted by other e
warrant a verdict or judgment in appellant's f

> "Prima facie evidence is a minimum q
> It is that which is enough to raise a presu
> of fact; or, again, it is that which is su
> when, unrebutted, to establish the fact."
>
> *Otis & Co. v. Securities & Exchange C*
> *sion,* 176 F. (2d) 34.

What evidence or proof then, if any, was
by the appellee to offset and controvert posit
affirmative evidence put forth by appellant?
admitted that no evidence was submitted by
pellee other than the transcripts of the immi
hearings, particularly the testimony of Wong
a part thereof, the introduction of which w
jected to by appellant. The only justification
thority, if any, that such transcripts of rec
the immigration hearings could be admitted
be under Section 1733 of Title 8, U.S.C.A. whi
vides, "(a) Books or records of accounts or
of proceedings of any department or agency
United States shall be admissible to prove
transaction or occurrence as a memorandum o

pts of testimony taken in the proceedings be-
Board of Special Inquiry. They also contain
sions of the Commissioner of Immigration
uralization Service and the Board of Immi-
Appeals dismissing the appeal of the appel-
m the adverse decision of the Board of Spe-
uiry denying that appellant is the son of
em and therefore not a citizen of the United
We do not believe these transcripts of testi-
r the decisions of the higher immigration
ies come within the purview of any statute,
deral or other, providing for their admission
nce in a judicial trial. Section 1733(a) of
U.S.C.A. clearly means that only minutes of
nigration proceedings shall be admitted to
ie act as a memorandum of which the pro-
were made, and thus, the transcript of testi-
uld only be admitted to show or prove the
from which the testimony was adduced as
nda that the proceedings before the Board of
Inquiry were held. Any paper, record or
t so offered is not admissible to prove the
ich it recites. This view was taken by the
United States v. Aluminum Co. of America,
71 when it held:

It is true that the document presently offered
ot admissible to prove the facts which it re-
s. That proposition is sustained by Watkins
Iolman, 16 Pet. 25, at page 56, 10 L. Ed 873,

Co., 274 U.S. 693 at page 703, 47 S. Ct
L. Ed 1302 * * *"

Also *Moran v. Pittsburgh-Des Moin*
Co., 86 Fed. Supp. 255.

In the case of *United States v. Internatio*
vester Co., supra, where the Government s
introduce as evidence a report of the Feder
Commission consisting of statements, testim
other documentary exhibits, the Court, in
such evidence as inadmissible, said:

"In support of its alternative content
competitive conditions have not been es
bringing about a situation in harmony
the Government relies in large measu
various statements and tabulations cont
the report of the Federal Trade Con
which was introduced in evidence over
jection of the International Company.
entirely plain that to treat the statement
report—based upon an ex parte investiga
formulated in the manner hereinabove se
as constituting in themselves substan
dence upon the questions of fact here
violates the fundamental rules of evid
titling the parties to a trial of issues of
upon hearsay, but upon the testimony o
having first-hand knowledge of the facts,
produced as witnesses and are subject t
of cross-examination * * *"

ıgs we quote the appropriate words of Sec- of 20 American Jurisprudence at page 578 579:

e mere fact that testimony has been given in course of a former proceedings between the es to a case on trial is no ground for its ad- ion in evidence. The witness himself, if able, must be produced the same as if he testifying de novo. His testimony given at rmer trial is mere hearsay. This rule applies stimony given by all witnesses at the former whether they were expert or lay witnesses."

E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812, citing R.C.L.;

vannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183;

Joseph v. Union R. Co., 116 Mo. 636, 22 S.W. 794, 38 Am. St. Rep. 626;

w York C. R. Co. v. Stevens, 126 Ohio St. 395, 185 N. E. 542, 87 A.L.R. 884;

ıdden v. Duluth & I. R. R. Co., 112 Minn. 303, 127 N.W. 1052, 21 Ann. Cas. 805.

el that if the defendant wanted to rely so upon the alleged uncle's statements, he roduce him as a witness instead of depend- his extrajudicial testimony. In the case of *States v. Campanaro,* 63 F. Supp. 811, the d:

is elementary in our system of law that the

Therefore, evidence which does not de
value solely from the credibility of the
but rests also on the veracity of another
is termed 'hearsay' and is ordinarily i
sible. *Hopt. v. People of Territory of U*
U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262. The
such evidence is that the other perso
whose credibility the jury must rely is n
ent in court and cannot be subjected t
examination. However, not every oral
ten extrajudicial statement offered in
comes within the hearsay rule. It is onl
the extrajudicial statement is offered t
lish the truth of the fact so stated that t
say rule can apply. Where the extra
statement is offered without reference
truth of the matter extrajudicially asser
merely to prove that the oral statement,
was made or that a written statement,
exists, then the evidence is without the
rule."

The Court continued:

"It should be noted that there is statu
thority for permitting the government t
the same facts by offering in evidence a
the government records under the seal
department. This statute merely codifies
mon-law exception to the hearsay rule, tha
the person whose statement is offered is
able for adequate reason and where ther
cumstantial probability of the truthfulnes

1420 et seq.; Demeter v. United States, 62
. D.C. 208, 66 F. 2d 188; United States v.
scoat, 4 Cir., 4 F. 2d 193. However, even this
ute does not permit the contents of govern-
t records to be proved by parol testimony as
here done. Nock v. United States, 2 Ct. Cl.
''

lso:

nited States v. Packard Sedan, 23 F. 2d 865.

e situation as the instant case arose in *Lee United States,* 49 F. (2d) 24. In that case the ent sought to overcome the prima facie case ppellant by the introduction of certain im- n records. The lower Court held for the gov- and ruled that such records were admissible. , the Appellate Court reversed the judgment,

thus appears that the court unconsciously wed the erroneously admitted record to in- nce him in the consideration of the case. This striking illustration of the danger of getting the record evidence not admissible under -recognized rules. If these records were con- ing in the decision of the case, it would seem the defendant should be discharged from ody. In judicial proceedings the court is re- ted in the reception of evidence to only such neets the requirements of legal proof.''

w of the well-established principles of evi-

tions the entire immigration records as evi
answer the prima facie case established by a
His opinion shows that his decision as to th
lant's claim was predicated principally upon
tents and statements in the transcripts of te
particularly the testimony of an uncle name
Gong, who made contradictory statements in
migration hearings, corroborating and then
dicting his meeting with the appellant in Hon
This uncle has shown himself in that proce
be untrustworthy in his statements and hence
lant rightfully refused to call him as a
Falsus in uno, falsus in omnibus. If the app
cides to rely upon the testimony of Wong Go
it is elementary that he should be called by
by the appellant, as suggested by the trial ju
page 63 of Transcript of Record.

> "In order to establish a right to i
> testimony of a witness given at a former
> is incumbent upon the proponent of s
> dence to lay a proper predicate for its i
> tion by showing the unavailability of the
> who gave the testimony sought to be p
> In other words, the burden of satisfying
> of the validity of the excuse for non-pr
> of witness lies upon the party seeking
> duce the testimony given by him at the
> trial. It must be shown either that the
> is dead, insane, or beyond the jurisdictio
> court or on diligent inquiry cannot be

ner trial cannot be produced as witness on the
ond trial. In the absence of proof of some
h circumstance, testimony of this character
be rejected."

0 Am. Jur. Sec. 698 at page 587.

CONCLUSION.

ubmit, briefly and simply, that the proceeding
he trial Court was in the nature of a new
examine the facts and testimony for a judi-
ermination of the issue, "Is the appellant the
Wong Yem, a citizen and national of the
States, and therefore a citizen and national
Jnited States?" It was not a hearing to re-
e administrative proceedings had before the
ation Service and the evidence, findings and
ons adduced and developed therein. The ap-
ubmitted the entire immigration records as
evidence to rebut the presumption created
appellant. However, from authorities cited,
scripts of testimony and the opinions which
art of the immigration files are inadmissible
ompetent evidence, and therefore could not
uld not be used to rebut and contravene the
blished by the appellant. Without the unre-
nd unstrustworthy statements of the alleged
Jong Gong, what then has the appellee offered,

petent evidence was offered by the appellee
cordingly, the appellant has established his
a preponderance of evidence.

It is, therefore, respectfully asked that t
ment for the defendant awarded by the Cou
be reversed, and that appellant be declared
and national of the United States.

Dated, San Francisco, California,
September 12, 1951.

Respectfully submitted,
CHOW AND SING,
Attorneys for App